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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Dockets Nos. 95-20, 98-10

REPLY COMMENTS OF EARTHLINK, INC.

Dave Baker
Vice President
Law and Public Policy
EarthLink, Inc.
1375 Peachtree Street, Level A
Atlanta, GA 30309
Telephone: 404-748-6648
Facsimile: 404-287-4905

Mark J. O'Connor
Kenneth R. Boley
LAMPERT & O'CONNOR, P.C.
1750 K Street, N.W., Suite 600
Washington, D.C. 20006
Telephone: 202-887-6230
Facsimile: 202-887-6231
Counsel for EarthLink, Inc.

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REPLY COMMENTS OF EARTHLINK, INC.

EarthLink, Inc., by its attorneys, hereby replies to the comments in the above-captioned rulemaking proceeding on the appropriate legal and policy framework for the existing and future wireline telephone network.[1] With the exception of the Bell Operating Companies and their consultants ("BOCs"), a broad diversity of the commenting parties are in agreement that deregulation of incumbent local exchange carrier ("ILEC") broadband transport services would disserve the public interest. In these Reply Comments, EarthLink points out that the BOCs' deregulatory proposals are widely opposed because they are unsupported by the facts of broadband deployment, they would undercut the reasonable reliance interests of all other participants in broadband services,

[1] Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10, FCC No. 02-42 (rel. Feb. 15, 2002) ("NPRM").

including ISPs and consumers, and they would undermine intramodal competition for no legitimate public purpose.

Introduction and Summary

A broad range of commenters – ISPs, consumer advocacy groups, long-distance carriers, States, and even federal agencies – have all urged the Commission to retain the fundamental Title II principles as applied to broadband transport of incumbent LECs. The reasons are many and varied, and the public interest is undeniable.

In contrast, however, the large incumbent LEC commenters in this proceeding urge the Commission to take sweeping regulatory action which would conflict with both law and common sense. First, the incumbents have proffered no public interest benefits that would follow from their proposed regulatory changes. Logic cringes at the notion that relaxation of network-opening and nondiscrimination rules and regulations would improve competition or accelerate the rate of DSL deployment. The proponents of these proposals have failed to offer any facts to overcome this disability. Ambiguous ILEC suggestions that they would offer services under private contract are wholly lacking as a basis for concluding that independent broadband Internet access service would continue or that the terms of such unilateral arrangements would serve the public interest. Instead, this proceeding requires a solid evidentiary record explaining how such deregulation would impact the information services market, allowing for a decision to be based on the facts, not vague promises. The Commission ought not impose broad regulatory change where, as here, the current rules are working well and the proposed changes will negatively impact the public interest.

Second, a host of parties, including independent ISPs, consumers, and state and federal agencies, have relied on the nondiscriminatory access provisions of Title II and the FCC *Computer Inquiry* proceedings. These interests cannot be ignored. For over two decades, the FCC's decisions have supported and encouraged access on a common carrier basis to ILEC services, including broadband services. Entrepreneurs were encouraged to develop information services for delivery over narrowband and broadband transmission. Today thousands of ISPs, including ILEC affiliates, compete against one another, each knowing that, as the FCC promised, the incumbent LECs would provide DSL transmission on a nondiscriminatory basis. Federal agencies, state regulators and legislatures, likewise, took the FCC's regulatory scheme to heart, basing their own rules and statutes on principles set in federal law. And the public, the millions of consumers who get high-speed Internet access service via incumbent LEC-provisioned DSL, also rely on the ability to choose their ISP, and to access information providers without interference from the incumbent LEC. Significantly, the BOC commenters fail to resolve these interests, or to address the multitude of practical problems that would arise from wrenching out the regulatory scheme that forms the very framework for both narrowband and broadband Internet access and superimposing a new one for broadband.

Finally, the Commission should not and cannot stray from the regulatory tenets of the Communications Act ("Act") that remain unchanged when applied to broadband access. The essence of the statute, common carrier precedent, and the *Computer Inquiries* decisions is the same: the Commission's mandate is to ensure that competitors can count on access to the incumbent LECs' networks and on nondiscriminatory treatment by the ILECs. This is still binding law today. Indeed, even the recent *USTA v.*

FCC decision confirms that the Commission must look to the local markets where, as the FCC's brief explained, there are no viable or ubiquitous common carrier alternatives to the incumbent LEC networks. In the absence of vibrant competitive choices in the local access markets, the current regulatory scheme is necessary to meet the requirements of the Act.

Discussion

I. THE BOCS' PROPOSALS FOR DEREGULATION OF BROADBAND TRANSPORT HAVE NO BASIS IN LAW OR FACT.

A. The Act Requires Title II Regulation of Incumbent LEC DSL Transport and "New Networks" Services.

Contrary to the claims of the BOC commenters, the Commission may not sidestep the obligations of the Communications Act – especially the obligations of Title II and the *Computer Inquiries* precedent – by unilaterally re-defining an open-ended set of incumbent LEC services as "information services." Deregulation under Section 10 of the Act is "[a]n integral part of th[e] framework" established by Congress which may be employed by the Commission, as appropriate, "if the Commission makes certain specified findings with respect to such [statutory] provisions or regulations."[2] However, BOC efforts to achieve deregulation through statutory semantics – that is, by re-defining transport services as "information services" for the resulting deregulatory status – badly undermines the Title II common carrier goals of the Act and Commission precedent.

As EarthLink and other commenters discussed in depth, the incumbent LEC bulk DSL services under consideration in this proceeding have been firmly and repeatedly

[2] *In the Matters of Bell Operating Companies; Petitions for Forbearance from the Application of Section 272*, Memorandum Opinion and Order, 13 FCC Rcd. 2627, ¶ 1 (1998).

classified as common carrier services subject to *Computer Inquiry* obligations. For example, as explained in the *Advanced Services MO&O*, advanced services offered by incumbent LECs, including DSL, "are telecommunications services" and BOCs are obligated to offer such services to competing ISPs.[3] Again, in the *Advanced Services Second R&O*, the Commission was unequivocal that "bulk DSL services sold to Internet Service Providers . . . are telecommunications services, and as such, incumbent LECs must continue to comply with basic common carrier obligations with respect to these services."[4]

Nor is ILEC DSL transport provided to ISPs "telecommunications" offered on a private carriage basis.[5] The suggestion of Qwest that bulk DSL services are currently

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[3] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd. 24012, ¶¶ 35-37 (1998) (*"Advanced Services MO&O"*).

[4] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237, ¶ 21 (1999) (*"Advanced Services Second R&O"*). *See, also, In the Matter of GTE Telephone Operating Cos.*, Memorandum Opinion and Order, CC Dkt. No. 98-79, FCC 98-292, ¶ 32 and n.111 (rel. Oct. 30, 1998), *reconsideration denied*, Memorandum Opinion and Order, FCC 99-41 (rel. Feb. 26, 1999) ("We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable," citing 47 U.S.C. §§ 204-205); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, Report and Order, 16 FCC Rcd 7418, ¶ 46 (2001) (*"CPE/Enhanced Services Unbundling Order"*) ("The internet service providers require ADSL service to offer competitive internet access service. We take this issue seriously, and note that all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers"). Contrary to Verizon's claims, these were well-reasoned decisions and not "regulatory creep." Comments of Verizon at 11.

[5] NPRM, ¶ 26 (seeking comment on whether xDSL is "telecommunications").

offered on a "private carriage" basis flatly contradicts Commission precedent.[6] Because it offers service indifferently under tariff to all eligible customers, Qwest is providing the service on a common carrier basis; as the court stated in *NARUC I*, "A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."[7] Indeed, Qwest's claims simply do not add up: in an effort to show "individually negotiated terms" for its bulk DSL offerings, Qwest asserts it offers four standard DSL services[8] to "over *400* independent ISPs."[9] Further, Qwest's general assertions for "blanket" private carriage treatment of DSL service conflict with the Commission precedent requiring a careful case-by-case examination before such a determination is reached, as well as a full examination of whether a legal compulsion arises to offer service on a common carrier basis.[10]

Future incumbent LEC service offerings – such as Broadband Passive Optical Networks ("BPON") or other services are generally alluded to by the incumbent LECs – are likewise governed by *NARUC I* precedent. Incumbent LECs should be required to offer any "new networks" or BPON-type service on common carrier terms under Title II

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[6] Comments of Qwest at 16; *see*, n. 4, *infra*.

[7] *Id.*, at 30; *see* Qwest Corporation, Tariff F.C.C. No. 1, ¶ 8.4 (*"Qwest DSL Service"*); *NARUC v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) (*"NARUC I"*).

[8] *Id.*, at n.40.

[9] *Id.*, at 14, 30 (emphasis in original).

[10] *State of Iowa v. FCC*, 218 F.3d 756 (D.C. Cir. 2000) (indiscriminate offering of telecommunications to restricted class of customers may constitute common carriage offering); *Virgin Islands Telephone v. FCC*, 198 F.3d 921, 924 (D.C. Cir. 1999) (After the 1996 Act, the FCC has held that "a carrier has to be regulated as common carrier if it 'will make capacity available to the public indifferently' or if 'the public interest requires common carrier operation of the proposed facility,'" *citing*, *Cable & Wireless, PLC*, 12 FCC Rcd. 8516, ¶¶ 14-15 (1997)).

requirements. The BOCs are vague on the fundamental issue of what exactly constitutes a "new network" service subject to more favorable regulatory treatment than other network services. Certainly, the Commission cannot create a new regulatory scheme for each technological or engineering advance in network architecture. Instead, *Computer Inquiry* principles of nondiscriminatory access remain just as relevant as the network evolves, and thereby encourage network changes to improve transport services for the benefit of all users of the network.[11]

After all, where a carrier possesses market power or, separately, controls bottleneck facilities, there arises a legal compulsion to offer the transmission services on a common carrier basis.[12] Since the incumbents' "new networks" will almost certainly rely upon their bottleneck control over the local loop, the central office space and facilities, as well as interoffice facilities, Title II obligations are necessary. As the Supreme Court noted, the addition of fiber-optic cable does not particularly alter the nature of the incumbent LEC's local network from a regulatory perspective: "[t]he local loop was traditionally, and is still largely, made of copper wire, though fiber-optic cable is also used, albeit to a far lesser extent than in long-haul markets, " and the loop is still

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[11] *In the Matter of Amendment of Sections 64.702 of the Commission's Rules,* Report and Order, 104 F.C.C. 2d 958, ¶ 211 (1986) (*"Computer III"*) (subsequent history omitted) (if carriers design their networks around ONA principles, such an approach is "self-enforcing in controlling discrimination"). This approach does not limit the network owner's ability to recover its costs or to enjoy profits on prudent network investments. Adherence to the *Computer Inquiry* approach also avoids regulatory shifts or compromises in return for promises of future "new networks."

[12] "[A] duty to deal indifferently, legislatively imposed in 1934 for communications carriers, was imposed because of a recognition of a carrier's monopoly control over essential services." *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, Further Notice of Proposed Rulemaking, 84 F.C.C. 2d 445, 468, ¶ 62 (1981).

"a transportation network for communications signals."[13] As the Supreme Court also noted, the incumbent's advantages are obvious: "[i]t is easy to see why a company that owns a local exchange . . . would have an almost insurmountable advantage not only in routing calls within an exchange, but through its control of this local market, in markets for terminal equipment and long-distance calling as well."[14] This same ownership of the ubiquitous local access facilities used to transport data services likewise establishes more than sufficient cause for common carrier treatment of the incumbent.

Moreover, the lack of alternative *common carrier* facilities available for users and ISPs in many markets also necessitates the application of Title II to these "new network" services.[15] It is equally difficult to envision how the incumbents' "new networks" would be offered in competition with alternative common carrier facilities in today's market, especially in light of the fact that cable operators are not currently offering common carrier service.[16]

If, after thorough consideration of an appropriately-directed record, the Commission finds that specific Title II obligations are too onerous or inappropriate, the

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[13] *See, Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1661 (2002).

[14] Id., at 18.

[15] *Cable & Wireless, PLC*, Cable Landing License, 12 FCC Rcd 8516, 8522 ¶ 15 (1997) (Under *NARUC I*, the Commission "generally [has] focused on the availability of *alternative common carrier facilities* in assessing whether to require that a proposed cable be offered on a common carrier basis.") (emphasis added); *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1474 (D.C. Cir. 1984) (A "key concern" is "the adequacy of the remaining common carrier capacity to serve users' needs.").

[16] Cable facilities should not be deemed alternative facilities available to ISPs since the Commission has held that cable facilities are not offered on a common carrier basis. *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Dkt. No. 00-185, CS Dkt. No. 02-52, FCC 02-77 (rel. March 15, 2002).

proper course for deregulation of DSL or "new networks" services is, of course, laid out specifically for the Commission in Section 10 of the Act.[17] As the Commission has held,

> 'the decision to forbear from enforcing statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why statutory criteria are met.' We therefore cannot forbear in the absence of a record that will permit us to determine that each of the tests set forth in Section 10 is satisfied for a specific statutory or regulatory provision.[18]

The incumbent LECs' general recitation of the regulatory disparity with cable modem services is inadequate to meet the statutory requirements for regulatory forbearance, since it fails to address the negative effects of deregulation on the public interest where there is a lack of effective competition in the marketplace.[19]

B. BOCs Have Failed to Identify the Services At Issue, and Have Presented Insufficient Cause to Justify Deregulation of Services.

The incumbent LEC commenters have failed to present specific and material facts to justify their proposed significant shifts in regulation. The paucity of facts by the few proponents of sweeping deregulation renders it impossible for commenters to evaluate

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[17] 47 U.S.C. § 160.

[18] *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Report and Order, 15 FCC Rcd. 17414, 17420 ¶ 13 (2000), *citing*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 113 (1998)("*Wireless Forbearance Order*").

[19] *See*, *Verizon Communications Inc.*, 122 S. Ct. at 1678 ("A basic weakness of the incumbents' attack, indeed, is its tendency to argue in highly general terms . . ."); *see also*, Comments of EarthLink, Inc., CC Dkt. No. 01-337 at 31-34 (March 1, 2002) (discussion of how deregulation of incumbent LEC DSL services would not meet public interest under Section 10 standards).

meaningfully the proposals, and impossible for the Commission to render a reasoned administrative decision adopting the proposals.[20]

As an initial matter, the incumbent LECs provide no specific or consistent explanation of the telecommunications services that would be subject to deregulation. Verizon, for example, argues that "broadband" deregulation should include any service – present or future – that is based on packet-switching or a successor technology,[21] while SBC has proposed in a related proceeding the deregulation of any service it offers with transmission capabilities over 56 kbps.[22] BellSouth goes further, introducing the concept of "provider parity," whereby incumbent LECs would be deregulated regardless of the telecommunications services offered.[23]

The Act, however, requires the Commission to engage in a fact-specific examination of the services subject to possible deregulation, including a fact-based evaluation of the effect of the proposed deregulation on competition in the relevant

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[20] *See, e.g., Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, et al.,* Memorandum Opinion and Order, 14 FCC Rcd. 19947, 19961 ¶ 25 (1999)(BOC requests for forbearance failed because the "BOC petitioners must provide more than just general conclusions about market conditions so that interested parties have a meaningful opportunity to refute, and this Commission has a meaningful opportunity to evaluate, the BOC petitioners' claims . . . ."), *remanded on other grounds, AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001) (Although the court did not disturb the FCC's determination that the BOC petitioners' general conclusions about market share did not provide adequate data to support a claim of reduced market share, the court stated that a policy making such data essential to a showing of non-dominance may be reasonable and remanded the case for the FCC to provide an explanation for such policy.).

[21] Comments of Verizon at 6.

[22] SBC Petition for Expedited Ruling that it is Non-Dominant in Its Provision of Advanced Services And For Forbearance From Dominant Carrier Regulation Of Those Services, at n. 2 and 30 (filed Oct. 3, 2001), incorporated in CC Docket No. 01-337.

[23] Comments of BellSouth at 8-9, 13-15.

markets and on other public interest factors.[24] Since the BOCs chose an open-ended set of future and existing services for deregulation, several commenters have noted, quite reasonably, that this approach could mean deregulation of voice services,[25] or special access services already subject to certain FCC regulatory relief,[26] or it could materially impact facilities-based competitive LECs by impeding their ability to obtain access to high-capacity loops.[27] Such deregulatory proposals are simply too vague to enable evaluation of public interest factors in a coherent manner.

Nor is it apparent what regulatory relief is necessary for the BOCs beyond that which is already available. For example, BellSouth already takes advantage of deregulation under the *Pricing Flexibility Order* in its provision of ADSL services.[28] In this proceeding, however, BellSouth does not explain what more, if anything, it needs to

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[24] *See, e.g., In the Matters of Bell Operating Companies; Petitions for Forbearance from the Application of Section 272*, Memorandum Opinion and Order, 13 FCC Rcd. 2627, ¶¶ 52-58 (1998) (describing BellSouth's reverse directory assistance service subject to forbearance of certain Section 272 requirements).

[25] Comments of Sprint Corp. at 3-4; Comments of Illinois Commerce Commission at 29; Comments of NARUC at 11-12.

[26] *See Access Charge Reform,* Fifth Report and Order, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order*), *aff'd, WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001). Given the breadth of the BOCs' proposed "broadband" deregulation, since almost all special access services would exceed 56 kbps, the proposal would eviscerate the Commission's measured Phase I and II approach in the *Pricing Flexibility Order.* EarthLink also notes that the *Pricing Flexibility Order* at n. 280 expressly provides the incumbent LECs with Phase I and II flexibility for DSL services

[27] Comments of Time Warner Telecom at 18-19.

[28] BellSouth Transmittal No. 642, F.C.C. Tariff No. 1 (filed May 31, 2002). Indeed, BellSouth recently relied on the deregulation under Phase I and II Price Flexibility authority to revise its ADSL tariff for a price promotion on one-day's notice in certain MSA's. On June 17, 2002, BellSouth again requested Phase I and II deregulatory treatment of its multiple virtual channel ADSL services, as well as certain ATM and Frame Relay services. BellSouth Transmittal No. 647, F.C.C. Tariff No. 1 (filed June 17, 2002).

respond to the market, consistent with the public interest. Indeed, for MSAs in which BellSouth has met the competitive "triggers" for Phase I and II pricing flexibility, it enjoys the prescribed relief; for MSAs where BellSouth cannot show indicia of competition, however, the regulatory safeguards serve a vital and necessary role.

Further, the BOCs provide no specific facts that the deregulation advocated would yield any benefits to the public, such as price reductions or a wider array of services. Instead, the record shows that even with regulation, the incumbent LECs have raised prices and that retail DSL prices rose soon after the demise of several competitive LEC providers.[29] The BOCs' proposed private carriage arrangements would simply permit incumbent LEC discrimination against consumers and ISPs, which also would likely result in upward pressure on retail prices. Moreover, the BOCs do not explain what, if any, retail services have been hampered under current regulation, nor do they explain what services would be offered for the public's benefit in the absence of regulation.[30]

Not even the BOC economists provide concrete arguments to explain why deregulation of the incumbent LECs' networks in the current market environment would be in the public interest.[31] Notably, none of the BOC economists examined the actual

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[29] AT&T Comments at 67-68; *Third Report*, ¶ 106 (noting SBC and Verizon residential rate increases earlier in the year).

[30] Verizon claims that it wants to avoid tariff obligations in order "to experiment with innovative pricing schemes." Verizon Comments at 3. Verizon, however, is free to engage in such pricing experiments today for its retail Internet access services, since they are unregulated information services.

[31] *Compare*, NPRM, ¶ 48 (seeking comment on the costs and benefits of *Computer III* access requirements).

level of competition for broadband access,[32] nor did any examine the differences in availability of broadband platforms that consumers may experience across geographic and other socioeconomic factors. Instead, the economists' positions are quite generalized; they postulate a highly competitive market, and then assert that the heavy hand of regulation should have no place in such a world. The Lexecon economists, for example, state that "cable modem services, digital subscriber line (DSL), satellite, and both fixed and mobile wireless . . . can be used to provide broadband Internet access services,"[33] but they fail to present facts regarding the degree of actual competition in the market and consumer availability of those potential platforms. Examining those issues, as the Commission and the Department of Commerce have done, reveals that satellite and fixed and mobile wireless contribute very little overall broadband access today or for the foreseeable future.[34] This would lead, at best, to a cable modem and DSL services duopoly and not to vibrant competition.[35] However, 35% of Californians live in

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[32] Comments of Lexecon, Inc. (filed May 3, 2002); Statement of 43 Economists on the Proper Regulatory Treatment of Broadband Internet access services (filed May 3, 2002).

[33] Comments of Lexecon, Inc. at 3.

[34] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans,* Third Report, CC Dkt. No. 98-146, FCC 02-33, at ¶¶ 55, 60 (rel. Feb. 6, 2002) (*"Third Report"*) (satellite technology accounts for only 150,000 lines); U.S. Department of Commerce, Economics and Statistics Administration, and National Telecommunications and Information Administration, *A Nation Online: How Americans Are Expanding Their Use of the Internet*, at 37 (February 2002), *found at,* < http://www.ntia.doc.gov/ntiahome/dn/anationonline2.doc> (*"A Nation Online"*) (Only 0.5% of American homes used technology other than dial-up modem, cable modem or DSL to access Internet).

[35] The Commission has noted, in the wireless context, that a duopoly creates market power for the duopolists, and does not constitute a competitive market. "[L]icensed cellular providers enjoyed duopoly market power, substantially free of direct competition from any other source." *In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for*

communities where DSL is the *only* broadband service choice, and of those Californians who live in cities that have access to either cable modem or DSL service, or both, 45% have access *only* to DSL.[36]

Similarly, the BOC economists do not adequately consider the costs with the putative benefits of removal of the current Title II and *Computer Inquiry* regulations, a core evaluation that any economist should perform under the public interest standard. While such a cost-benefit review would examine the incumbents' cost savings and benefits, it would also evaluate the costs and losses for consumers and independent ISPs if access via the telecommunications services of incumbent LECs were closed, as well as the effects of such closure on the nation's information economy.[37] Further, while these economists generally assert that imposition of Title II obligations "at the beginning of a product cycle is likely to be harmful to entrepreneurs and consumers alike," they fail to explain what new "product cycle" or "entrepreneurs" they refer to.[38] Certainly, they are not referring to DSL technology (which has been available for many years) or the DSL platform of the incumbent LECs, which has been growing rapidly under Title II and *Computer Inquiry* obligations for the past four years.

Forbearance For Broadband Personal Communications Services, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 21 (1998).

[36] Reply Comments of the People of the State of California and the California Public Utilities Commission, CC Docket 01-337 (April 22, 2002) at 14 and Appendix A.

[37] *A Nation OnLine*, Ch. 6 at 57 (As of September 2001, 41.7% of American workers use Internet services at work.).

[38] Comments of Lexecon, Inc. at 5.

Moreover, while the BOCs promise that deregulation will result in an "explosion of broadband access,"[39] the facts presented by the FCC and the Department of Commerce show rapid broadband deployment under the current regulatory environment, which is meeting reasonable expectations for facilities deployment.[40] Vague incumbent LEC *quid-pro-quo* promises for quicker and more thorough deployment in return for deregulation are unsupported by evidence and are no basis for administrative action.

Indeed, the Commission was wise to avoid these BOC promises in the past. In 1997, the BOCs' Section 706 Petitions alleged that significant deregulation was necessary to provide the BOCs with sufficient incentives to deploy DSL services to the American public. For example, Bell Atlantic (now Verizon) asserted that "the slow pace at which high-speed broadband services are becoming available . . . confirms that existing regulatory restrictions have slowed investment in the necessary advanced services,"[41] and SBC proclaimed that various FCC regulations "hinder the deployment of ADSL by the SBC LECs, and act to deny or slow the benefits of this new technology to consumers."[42] The Commission, of course, rejected the BOC petitions in the *Advanced Services MO&O*, and time has proven this to be the correct approach. The BOCs have rolled out their DSL networks at a rapid and accelerating rate while under Title II and *Computer*

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[39] Comments of SBC Communications Inc. at 3.

[40] *Third Report,* ¶ 89; *A Nation Online,* at 37, Fig. 4-3 ("growth in broadband compares favorably to the deployment rates of other communications technologies and services").

[41] Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Services, CC Dkt. No. 98-11 at 1 (filed January 26, 1998).

[42] Petition of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell For Relief from Regulation, CC Dkt. No. 98-91 at i (filed June 9, 1998).

Inquiry obligations.[43] As BOC DSL deployment continues into its fourth year, now is not the time for the Commission to second-guess this decision or to be lured by re-hashed BOC demands for deregulation.

Further, the facts also undermine the proposition that broadband access in rural areas can be addressed positively through BOC deregulation. First, BOCs do not serve all areas in rural America. Indeed, incumbent telephone companies serving rural areas urge the Commission not to force regulatory reclassification of DSL services and openly question whether such changes might, in fact, harm their ability to deploy broadband services.[44] Moreover, as NTIA and the U.S. Department of Agriculture have found, BOC deployment of DSL has focused on urban areas.[45] The well-known distance and economic limitations on DSL in rural areas also make it unlikely that BOC deregulation would lead to increased deployment in rural areas.[46]

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[43] *Third Report*, App. C, Tables 3 & 4 (noting significant increases in the sale of ILEC high-speed and advanced services from June 2000 to June 2001).

[44] Comments of OPASTCO AT 3-5 (urges the FCC to continue to permit rural incumbent LECs to continue with tariff-based "pooling"); Comments of Nebraska Independent Companies at 3 (notes the "negative policy implications" of reclassifying xDSL service as an information service); Comments of National Telecommunications Cooperative Ass'n at 1, 6 (rate of return incumbent LECs should be permitted to continue to tariff stand-alone broadband transport as an interstate telecommunications service, which has "helped small and rural carriers . . . provide reliable and affordable telecommunications services to rural America").

[45] NTIA and U.S. Department of Agriculture, "Advanced Telecommunications in Rural America: The Challenge of Bringing Broadband Service to All Americans," at 20 (April 2000) ("RBOC DSL deployment has primarily occurred in cities of 10,000 or more, while most localities with DSL have populations of 25,000 or higher") and at 22 ("the percentage of cities with RBOC-provided DSL service decreases rapidly with city size").

[46] *Id.*, at ii ("The primary reason for the slower development rate in rural areas is economic. For wireline construction, the cost to serve a customer increases the greater the distance among customers.").

Finally, Internet communications progress and common sense suggest that the elimination of network-opening regulations will retard competition, investment and innovation.[47] As many commenters have pointed out, incumbent LECs employed DSL technology long before offering it as an individual end-user service, and it was only with the roll-out of competitive DSL providers that incumbent LECs deployed the technology at all.[48]

II. THE BOCs' PROPOSED SWEEPING CHANGES IGNORE THE PUBLIC RELIANCE ON CURRENT REGULATION.

The number of commenters that strongly oppose the sweeping changes proposed by the incumbent LECs and tentatively adopted by the FCC in the NPRM is testament to the enormous hardship this sea-change in the regulatory landscape would impose on businesses and individuals that have long relied upon non-discriminatory access to ILEC wireline broadband services and networks. Likewise, hundreds of thousands of consumers nationwide are, like the independent ISPs to which they subscribe, dependent upon ILECs to continue to provide DSL transport at reasonable rates, terms, and conditions. In an effort to calm any FCC fears that they would change the way they treat non-affiliated ISPs, the ILECs offer generalized, unenforceable promises, upon which they expect the Commission and the public to depend in lieu of current rules. The

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[47] Indeed, Internet architecture has developed on a layering model, whereby the functionality of the application and the transport layers are distinct and accessible. *See*, D. Comer, Internetworking with TCP/IP, Volume I, at § 11.4 (Functionality of the Layers) (1995). *See also,* Letter of Vint Cerf, WorldCom, to FCC Chairman Powell and Commerce Secretary Evans, CC Docket No. 02-33, et al., (May 20, 2002) ("IP protocol has allowed the creation of open, interconnected networks" which was also supported by the FCC's *Computer Inquiry* decisions.).

[48] *See, e.g.* Covad Comments at 32-37.

Commission should not be misled by the ILECs' mantra of "deregulation." The current regulatory scheme properly distinguishes between unregulated, competitive information services, including DSL-based broadband Internet access, and non-competitive and therefore regulated telecommunications transport such as DSL, which provides the basic input for that service. These rules have brought broadband this far and will carry it further if the FCC does not shake the regulatory foundations upon which ISPs have based their broadband business plans and pursuant to which hundreds of thousands of consumers across the U.S. currently receive DSL service.

A. Independent ISPs and Their Customers, As Well As Federal and State Entities, Reasonably Rely Upon Broadband Network Access.

Since *Computer III*, the framework for telecommunications access between independent ISPs and their customers has rested on the regulatory certainty of reasonable, non-discriminatory access to the incumbent LEC's services and networks, fashioning business plans upon an expectation backed by law. Broadband ISPs like EarthLink, for example, promote high-speed Internet access to consumers in many markets based on the knowledge that ILECs are required to provide the DSL transport that ISPs can use to provide high-speed Internet access service. The ISPs also relied on the network-opening and anti-discrimination provisions the FCC adopted in the *Computer Inquiries* to help ensure that ILECs were treating them as well as their own affiliated ISPs. End-users of DSL-based Internet service in turn have enjoyed access to ISPs from which they can obtain a range of services.

An FCC rule modification that would bring sweeping change to these interests would raise significant legal and policy issues.[49] Indeed, like the petitioners in *NAITP*, ISPs and their customers have "had good reason to rely on their status under the [prior] rule" because the FCC "did not merely acquiesce" in the ISPs' deployment of broadband Internet services, but, as the petitioners' in that case, the FCC here "invited and encouraged them"[50] in its decisions.[51]

Sweeping regulatory changes such as those proposed by the BOCs, and as suggested in the NPRM, would also adversely impact the crucial work of federal law enforcement, national security, and state regulatory agencies as well. The Secretary of Defense, concerned about the viability of national security and emergency preparedness communications, objects to the removal of broadband services from Title II regulation.[52] The FBI is concerned that reclassifying xDSL service as private carriage could impact CALEA coverage of "common carrier[s] for hire" and states that it would be "untenable to suggest that the same carrier would be exempt from CALEA merely because it offered

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[49] *National Ass'n of Independent Television Producers and Distributors v. FCC*, 502 F.2d 249, 255 (2d Cir. 1974) (FCC rulemaking change was "unreasonable because it would cause serious economic harm" to the petitioners who had established reliance interests) ("*NAITP*").

[50] Id.

[51] *Advanced Services Second R&O*, 14 FCC Rcd. at ¶¶ 3, 18 (bulk DSL services sold to ISPs will promote deployment of advanced services by ISPs to consumers, which will advance the goals of Section 706 of the 1996 Act); *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd at ¶ 46 ("The internet service providers require ADSL service to offer competitive internet access service.").

[52] Secretary of Defense Comments at 2-3.